

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KENNETH LEE CRONK,

Plaintiff,

v.

CITY OF WEST RICHLAND,

Defendant.

NO: 12-CV-5094-TOR

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT is Defendant's Motion for Summary Judgment (ECF No. 23). This matter was heard without oral argument on February 21, 2013. The Court has reviewed the relevant pleadings and supporting materials, and is fully informed.

BACKGROUND

Pro se Plaintiff, Kenneth Lee Cronk, brings a § 1983 claim against Defendant City of West Richland for alleged violations of the Fourth, Fifth, and Fourteenth Amendments. Plaintiff also appears to claim that Defendant violated 18 U.S.C. §§ 241, 242, 371, 1503, and 1512(a)(k). Last, Plaintiff alleges that

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1 Defendant “disregarded all provisions expressed in” the Americans with
2 Disabilities Act (“ADA”). ECF No. 6 at ¶ 13. Presently before the Court is
3 Defendant’s motion for summary judgment on all claims.

4 FACTS

5 On June 8, 2012, the West Richland Police Department was contacted by
6 Mary Jo Byers (“Byers”) at the Washington Department of Social and Health
7 Services (“DSHS”) Division of Developmental Disabilities. *See* Defendant West
8 Richland’s LR 56.1 Statement of Undisputed Facts, ECF No. 28 (“Def. SOF”) at ¶
9 6. Byers reported that Hailey Thaelke (“Thaelke”), a DSHS employee, was on the
10 phone with Plaintiff. According to Byers, Plaintiff stated that he was a Vietnam
11 veteran with PTSD and that he planned to shoot at state agencies. During this
12 telephone call, Plaintiff complained about government agencies wronging him and
13 his family, including DSHS, Benton County courts, the West Richland Police
14 Department, the State Attorney General’s office, and city attorneys. *Id.* Officer
15 Terry Boehmler (“Boehmler”) was dispatched to Plaintiff’s home, where he was
16 assisted by Officers Levi Glatt (“Glatt”) and Douglas Doshier (“Doshier”).
17 Thaelke remained on the line with Plaintiff while Boehmler traveled to Plaintiff’s
18 home.

19 Upon arriving at Plaintiff’s home, Boehmler observed Plaintiff exit the front
20 door of his home and walk around his driveway. No firearms were observed on

1 Plaintiff. Boehmler approached Plaintiff and asked about the conversation with
2 DSHS. According to Boehmler, Plaintiff responded that he was upset at local
3 agencies, the police chief, the court system, the governor's office, and the hospital
4 because those entities failed to provide the required care for his family. *Id.* at ¶ 10.
5 Boehmler asked Plaintiff about the threat to shoot at state agencies, which Plaintiff
6 denied. Boehmler asserts that he told Plaintiff he had no right to threaten state
7 agencies or employees, to which Plaintiff replied that he did have that right. At
8 this point Boehmler told Plaintiff he was taking him into custody. According to
9 Boehmler, Plaintiff yelled for Boehmler to take him to jail.

10 At this point, Boehmler took Plaintiff's right wrist, and Doshier took
11 Plaintiff's left wrist, in order to handcuff him. Plaintiff drew his hands up to his
12 face and allegedly resisted officers' attempts to lower his hands. As Boehmler and
13 Doshier attempted to force Plaintiff's hands down, Plaintiff yelled that they were
14 hurting his shoulder. Boehmler maintains that he told Plaintiff to relax and not
15 resist, but Plaintiff did not comply. Subsequently, another officer "controlled"
16 Plaintiff's head and shoulders, as Doshier and Boehmler placed Plaintiff on the
17 ground in order to handcuff him, despite Plaintiff's continued struggling. *Id.* at ¶
18 13. Boehmler placed Plaintiff in the back of his patrol car, and Plaintiff refused to
19 wear a seatbelt.

1 While he was being handcuffed, Plaintiff complained that he was injured.
2 Boehmler called paramedics to examine Plaintiff, and the paramedics indicated
3 that Plaintiff suffered no injury. At this point, Boehmler spoke with Thaelke who
4 indicated that Plaintiff told her he spoke with Crisis Response center earlier in the
5 day and mentioned being suicidal or potentially shooting others. Thaelke asked
6 Plaintiff if shooting others was a concern, to which he responded that it was always
7 a concern, although it was under control at present. *Id.* at ¶ 16. Next Boehmler
8 spoke with Hector and the Crisis Response center, and Hector prepared a detain
9 and transport authorization in accordance with RCW 71.05.150, due to Plaintiff
10 posing a threat to himself or others. Boehmler transported Plaintiff to Kadlec
11 Regional Medical Center (“Kadlec”), at which point Plaintiff’s handcuffs were
12 removed. According to Boehmler, Plaintiff was then transported to the Crisis
13 Response center for an evaluation. No charges were filed against Plaintiff for the
14 events of June 8, 2012.

15 Plaintiff’s recollection of the events is in stark contrast with those outlined
16 above, namely: he never indicated to Thaelke that he was intent on doing physical
17 harm to himself or others; he did not resist handcuffing; he informed Boehmler of
18 his disabilities and previous shoulder injuries; his head was pinned to the ground
19 and he lost consciousness for seconds; he was read his Miranda rights after being
20 placed in the patrol car; the paramedic examination was not comprehensive; he did

1 not refuse to wear his seatbelt; and he was never taken to the Crisis response
2 center. However, as required under FRCP 56(c), Plaintiff fails to offer any support
3 for these factual assertions by citing to particular parts of the record, including
4 depositions, documents, electronically stored information, affidavits or
5 declarations, stipulations, admissions, or interrogatory answers. Fed. R. Civ. P.
6 56(c); *see also* Notice to *Pro Se* Litigants of the Summary Judgment Rule
7 Requirements, ECF No. 29 (“you cannot rely only on what your complaint says ...
8 [i]nstead you must provide specific facts using the type of evidence set forth
9 above.”). In light of Plaintiff’s failure to properly support or address assertions of
10 fact under FRCP 56(c), the court exercises its discretion to consider the properly
11 supported facts offered by Defendant’s uncontradicted declarations as undisputed
12 only for the purposes of the instant motion. *See* Fed R. Civ. P. 56(e)(2).

13 DISCUSSION

14 A. Standard of Review

15 The Court may grant summary judgment in favor of a moving party who
16 demonstrates “that there is no genuine dispute as to any material fact and that the
17 movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). In ruling
18 on a motion for summary judgment, the court must only consider admissible
19 evidence. *Orr v. Bank of America, NT & SA*, 285 F.3d 764 (9th Cir. 2002). The
20 party moving for summary judgment bears the initial burden of showing the

1 absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S.
2 317, 323 (1986). The burden then shifts to the non-moving party to identify
3 specific facts showing there is a genuine issue of material fact. *See Anderson v.*
4 *Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). “The mere existence of a scintilla
5 of evidence in support of the plaintiff’s position will be insufficient; there must be
6 evidence on which the jury could reasonably find for the plaintiff.” *Id.* at 252.

7 For purposes of summary judgment, a fact is “material” if it might affect the
8 outcome of the suit under the governing law. *Id.* at 248. Further, a material fact is
9 “genuine” only where the evidence is such that a reasonable jury could find in
10 favor of the non-moving party. *Id.* The court views the facts, and all rational
11 inferences therefrom, in the light most favorable to the non-moving party. *Scott v.*
12 *Harris*, 550 U.S. 372, 378 (2007).

13 **B. § 1983 claim**

14 A cause of action pursuant to 42 U.S.C. § 1983 may be maintained “against
15 any person acting under the color of law who deprives another ‘of any rights,
16 privileges, or immunities secured by the Constitution and laws’ of the United
17 States.” *Southern Cal. Gas Co., v. City of Santa Ana*, 336 F.3d 885 (9th Cir. 2003)
18 (citing 42 U.S.C. § 1983). The rights guaranteed by § 1983 are “liberally and
19 beneficently construed.” *Dennis v. Higgins*, 498 U.S. 439, 443 (1991). Construed
20 liberally, Plaintiff appears to allege claims for violation of his Fourth, Fifth, and

1 Fourteen Amendment rights under § 1983. Although it is not clear from Plaintiff's
2 pleadings, Defendant "guesses" Plaintiff is asserting that he was wrongfully seized
3 and/or that Defendant used excessive force. However, it is unnecessary for the
4 Court to reach the merits of Plaintiff's particularized claims under § 1983, because
5 the Defendant is entitled to summary judgment on the issue of municipal liability
6 as a matter of law.

7 The Supreme Court has held that local governments are "persons" who may
8 be subject to suits under § 1983. *Monell v. Department of Social Servs.*, 436 U.S.
9 658, 690 (1978). However, a municipality may only be held liable for
10 constitutional violations resulting from actions undertaken pursuant to an "official
11 municipal policy." *Id.* at 691. As the Supreme Court articulated in *Monell*, the
12 purpose of the "official municipal policy" requirement is to prevent municipalities
13 from being held vicariously liable for unconstitutional acts of their employees
14 under the doctrine of respondeat superior. *Id.*; *Pembaur v. City of Cincinnati*, 475
15 U.S. 469, 478-79 (1986); *Bd. of Cnty. Comm'ns of Bryan Cnty. v. Brown*, 520 U.S.
16 397, 403 (1997). To prevail on a municipal liability claim, a plaintiff must show
17 (1) plaintiff's constitutional rights were violated, (2) the municipality had customs
18 or policies in place at the time that amounted to deliberate indifference, and (3)
19 those customs or policies were the moving force behind the violation of rights. *See*
20 *Estate of Amos ex. rel. Amos v. City of Page*, 257 F.3d 1086, 1094 (9th Cir. 2001).

1 “A plaintiff cannot prove the existence of a *municipal* policy or custom
2 based solely on the occurrence of a single incident of unconstitutional action by a
3 non-policymaking employee.” *Davis v. City of Ellensburg*, 869 F.2d 1230, 1233
4 (9th Cir. 1989)(emphasis in original). Rather, the Ninth Circuit recognizes four
5 categories of “official municipal policy” sufficient to establish municipal liability
6 under *Monell*: (1) action pursuant to an express policy or longstanding practice or
7 custom; (2) action by a final policymaker acting in his or her official policymaking
8 capacity; (3) ratification of an employee’s action by a final policymaker; and (4) a
9 failure to adequately train employees with deliberate indifference to the
10 consequences. *Christie v. Iopa*, 176 F.3d 1231, 1235-40 (9th Cir. 1999).

11 The only evidence offered by Plaintiff to demonstrate a longstanding
12 practice or custom by Defendant as to any alleged unlawful arrest or excessive
13 force, is a submission entitled “Brief Amicus Curiae of David Carl Gustafson.”
14 ECF No. 21. Plaintiff argues that the “Amicus” experienced a “false arrest”
15 situation similar to that of the Plaintiff. ECF No. 33 at 11-12. However, Mr.
16 Gustafson has not been granted leave to appear in these proceedings as an amicus
17 curiae. “The privilege of being heard amicus rests in the discretion of the court
18 which may grant or refuse leave according [to whether] it deems the proffered
19 information timely, useful, or otherwise.” *Cnty. Ass’n for Restoration of*
20 *Environment (CARE) v. DeRuyter Bros. Dairy*, 54 F.Supp.2d 974, 975 (E.D. Wash.

1 1999)(noting that, historically, an amicus curiae is an impartial individual rather
2 than an advocate of one point of view). Mr. Gustafson has not petitioned the Court
3 for leave to file an amicus brief, and even if the Court were to construe his filing as
4 such a motion, the Court declines to grant amicus status to Mr. Gustafson in this
5 case.

6 Plaintiff fails to offer any evidence identifying a policy or custom of the
7 Defendant that amounted to deliberate indifference, or that such a policy or custom
8 was the “moving force” behind the deprivation of Plaintiff’s constitutional rights.
9 Therefore, the Court finds as a matter of law that Defendant City of West Richland
10 cannot be held liable under § 1983 for the alleged violation of Plaintiff’s
11 constitutional rights.

12 **C. 18 U.S.C. §§ 241, 242, 371, 1503, and 1512(a)(k) claims**

13 In his responsive briefing, Plaintiff appears to concede that he has no
14 standing to assert claims under criminal statutes 18 U.S.C. §§ 241, 242, 371, 1503,
15 and 1512(a)(k). ECF No. 33 at 13-14. Instead, Plaintiff insists that he has standing
16 to “use these criminal statutes as an illustration of the criminal behavior of the
17 Defendant.” *Id.* As Plaintiff has no private cause of action under these statutes,
18 Defendant’s motion for summary judgment on these claims is granted.

19 **D. ADA claim**

20 The ADA provides that “no qualified individual with a disability shall, by

1 reason of such disability, be excluded from participation in or be denied the
2 benefits of the services, programs, or activities of a public entity, or be subjected to
3 discrimination by any such entity.” 42 U.S.C. § 12132. Courts apply a three part
4 test to determine whether an individual is disabled under the ADA: (1) does the
5 individual have a physical or mental impairment; (2) does the impairment limit one
6 or more major life activities; and (3) is the limitation on the major life activity
7 substantial. *See Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

8 Construed liberally, it is still unclear precisely what claim Plaintiff is making
9 under the ADA. Regardless, Plaintiff fails to offer admissible evidence showing
10 he is disabled under the ADA, he was denied a benefit or service ordinarily
11 provided to arrestees, or that he was discriminated against because of his disability.

12 **ACCORDINGLY, IT IS HEREBY ORDERED:**

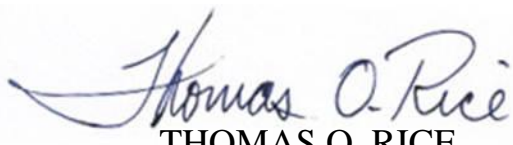
13 1. Defendant’s Motion for Summary Judgment, ECF No. 23, is

14 **GRANTED.**

15 The District Court Executive is hereby directed to enter this Order, provide
16 copies to counsel and Plaintiff at his last known address, enter judgment
17 accordingly, and **CLOSE** the file.

18 **DATED** this 25th day of February, 2013.




THOMAS O. RICE
United States District Judge